

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN RE PERSONAL RESTRAINT PETITION OF:

ROBIN T. SCHREIBER,

PETITIONER.

**SSURREPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Jeffrey E. Ellis #17139
Attorney for Mr. Schreiber

Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
206/218-7076 (ph)
JeffreyErwinEllis@gmail.com

A. INTRODUCTION

During jury selection, the trial judge *sua sponte* announced that two potential jurors would be privately questioned about whether they saw Mr. Schreiber being escorted in shackles. No pre-closure hearing of any sort took place.

The State now argues that reversal is not required for this “structural error” because either Schreiber consented to the closure or because the closure was too short to merit reversal. Alternatively, the State asks this Court to overrule the Washington Supreme Court’s decision in *Morris* and require a showing of specific prejudice for a structural error reviewed in post-conviction.

Each of the State’s arguments fails.

B. FACTS

The additional transcript provided by the State corroborates Schreiber’s earlier factual recitations.

Although parts were inaudible, during jury selection the trial judge was informed by a judicial assistant that two potential jurors had left the jury room without permission. (Supp) RP 322. The judge then told the lawyers about the wandering jurors and then told defense counsel:

“...we’re going to be talking to a couple jurors in my chambers.” RP 323. Defense counsel noted that he may have seen the jurors “out of the corner of his eye.” *Id.*

The judge then asked and encouraged defense counsel if he would waive Schreiber's right to be present during the private voir dire session. *Id.* Each juror was then privately questioned in chambers. RP 324-329. One juror, who saw Schreiber in handcuffs and who also was aware of pretrial publicity about Schreiber's arrest and prosecution, was dismissed for cause. *Id.* at 329.

C. ARGUMENT

This Case Is Nothing Like Momah.

Like many of the closed court cases resulting in reversal, defense counsel did not object to the trial judge's decision to question two jurors in chambers. *See e.g., State v. Paumier*, __ Wn.2d __, 288 P.3d 1126, 1129 (2012) (Judge *sua sponte* announces that four juror will be questioned in chambers. Defense counsel and Paumier "were present for the questioning and offered no objections."). Washington courts have consistently held that the failure to object and participation in closed courtroom voir dire does not constitute a waiver of the issue.

Likewise, Schreiber did not waive his right to a public trial when counsel waived Schreiber's right to be present. *In re PRP of Morris*, __ Wn.2d __, 288 P.3d 1140 (2012). "Waiver of the right to be present, however, should not be conflated with waiver of the right to a public trial." *Id.*

The State attempts to evade these holdings by arguing that Schreiber’s case is like *State v. Momah*, 167 Wash.2d 140, 152, 217 P.3d 321 (2009), because Schreiber’s counsel questioned jurors in chambers and because he asked several questions to a juror about pre-trial publicity. However, *Momah* is distinguishable because in that case (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone-Club* factors. *State v. Wise*, __ Wn.2d __, 288 P.3d 1113, 1119 (2012).

This case is nothing like the “unique confluence” of facts in *Momah*. Schreiber’s trial counsel did not “affirmatively assent” to the closure and did not assist in designing the closure. Instead, he simply asked questions of a juror—who was already being questioned in a private setting.

Just as if not more importantly, the trial court did not conduct any portion of the required *Bone-Club* hearing. *Wise* made it clear that because almost all of a *Bone-Club* hearing was conducted and because counsel sought closure reversal was not warranted in *Momah*. “(T)he record made clear—without the need for a *post hoc* rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure. *Wise*, 288 P.3d at 1120.

Despite relying exclusively on *Momah*, the State cannot point to a single part of the *Bone-Club* test that was met in this case.

This case is nothing like *Momah*.

Reversal is Required

The State urges this Court not to reverse because the closure was too short to implicate the right to a public trial and because *Morris* was wrongly decided and should be overruled. In both cases, this Court would need to overrule Washington Supreme Court precedent to side with the State, which this Court cannot do. To the extent that the State seeks to preserve this argument for the possibility of further review, it has done so.

D. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 12th day of February, 2013.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis
Jeffrey Erwin Ellis #17139
Attorney for Mr. Schreiber

Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
206/218-7076 (ph)
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this surreply brief on opposing counsel by sending a copy via email to the Clark County Prosecutor's Appellate Division to the following email addresses:

Anne.Cruser@clark.wa.goprosecutor@clark.wa.go

v

February 12, 2013//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis